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No. 34326-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LERON FORD,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Sergio Armijo,
The Honorable Vicki Hogan, Judges

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u>	1
B.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
C.	<u>STATEMENT OF THE CASE</u>	3
	1. <u>Procedural Facts</u>	3
	2. <u>Facts relating to offenses</u>	4
	3. <u>Overview of relevant facts</u>	5
D.	<u>ARGUMENT</u>	11
	THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO AMEND THE INFORMATION TO ADD THE CHARGE OF INTENTIONAL SECOND DEGREE MURDER NEARLY 20 YEARS AFTER THE FIRST TRIAL	11
E.	<u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

SUPREME COURT

<u>In re Address</u> , 147 Wn.2d 602, 56 P.3d 981 (2002) . . .	2-5, 7-8, 13-15, 17
<u>In re Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	21
<u>In re Hinton</u> , 152 Wn.2d 853, 100 P.3d 801 (2004)	2, 4, 5
<u>State v. Anderson</u> , 94 Wn.2d 176, 616 P.2d 612 (1980)	12, 14
<u>State v. Anderson</u> , 96 Wn.2d 739, 638 P.2d 1205, <u>cert. denied</u> , 459 U.S. 842 (1982)	13, 14
<u>State v. Berlin</u> , 133 Wn.2d 541, 947 P.2d 700 (1997)	13
<u>State v. Dallas</u> , 126 Wn.2d 324, 892 P.2d 1082 (1995)	12, 16
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	19
<u>State v. Gamble</u> , 154 Wn.2d 457, 114 P.3d 646 (2005)	19
<u>State v. Harris</u> , 69 Wn.2d 928, 421 P.2d 662 (1966)	17
<u>State v. Johnson</u> , 104 Wn.2d 338, 705 P.2d 773 (1985)	18
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995)	18, 19
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997)	16
<u>State v. Russell</u> , 101 Wn.2d 349, 678 P.2d 332 (1984)	12
<u>State v. Thompson</u> , 88 Wn.2d 13, 558 P.2d 202 (1977)	17
<u>State v. Tomal</u> , 133 Wn.2d 985, 948 P.2d 833 (1997)	21
<u>State v. Wanrow</u> , 91 Wn.2d 301, 588 P.2d 1320 (1978)	17

COURT OF APPEALS

<u>State v. Carter</u> , 56 Wn. App. 217, 783 P.2d 589 (1989)	16
---	----

<u>State v. Ramos</u> , 124 Wn. App. 334, 101 P.3d 872 (2004)	14, 17
<u>State v. Safford</u> , 24 Wn. App. 783, 604 P.2d 980 (1979)	17
<u>State v. Theroff</u> , 25 Wn. App. 590, 608 P.2d 1254, <u>reversed in part and on other grounds</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980)	17
<u>State v. Wiley</u> , 26 Wn. App. 422, 613 P.2d 549, <u>review denied</u> , 94 Wn.2d 1014 (1980)	18

FEDERAL AND OTHER STATE’S CASELAW

<u>Jones v. United States</u> , 167 F.3d 1142 (7 th Cir. 1998)	21
<u>United States v. Abarca</u> , 985 F.2d 1012 (9 th Cir.), <u>cert. denied</u> , 508 U.S. 979 (1993)	22
<u>United States v. Cockerham</u> , 237 F.3d 1179 (10 th Cir. 2001), <u>cert. denied</u> , 534 U.S. 1085 (2002)	21
<u>United States v. Henderson</u> , 72 F.3d 463 (4 th Cir. 1994)	21
<u>United States v. Pruitt</u> , 32 F.3d 431 (9 th Cir. 1994)	21

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I, § 22	20
CrR 4.3.1	1, 2, 11
<u>Former</u> RCW 9A.32.030(1)(b)	12
<u>Former</u> RCW 9A.32.050(1)(b) (1975)	3, 5, 13, 14
<u>Former</u> RCW 9A.36.020(1)(b) (1986)	3, 5
RCW 10.61.003	20
RCW 10.61.006	20
RCW 9A.36.011	15

Sixth Amendment	21
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OTHER AUTHORITIES

ABA Standards Relating to Joinder and Severance 19 (Approved Draft, 1968)	12
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A. ASSIGNMENTS OF ERROR

1. The mandatory joinder rule, CrR 4.3.1, was violated when the prosecution was allowed to add a charge of second-degree intentional murder nearly 20 years after the original charge.

2. The trial court erred in holding that a new charge filed 19 years after the first charge was not subject to the mandatory joinder rule because the original charge was found invalid.

3. The trial court erred in failing to fully consider the facts relevant to the “ends of justice” exception to the mandatory joinder rule before applying that exception.

4. Appellant assigns error to the emphasized portions of the following findings contained in the Order Allowing State to Pursue Intentional Second Degree Murder at Trial:

Now, some nineteen years after this case first went to trial, the State seeks to amend the charge to an alternative charge of intentional second degree murder. *The court finds that charge is in essence not an alternative charge at all because the original charge filed, second degree felony murder predicated on assault, has been held to be a charge that never existed. Further, if the court grants the defendant’s motion to preclude the State from filing intentional murder, the State will have no charges that it can file because there are no lesser included offenses to felony murder two as originally charged and any other charge (e.g., intentional murder or manslaughter) would be a related offense under the mandatory joinder rule. Thus a strict application of the mandatory joinder rule would have the effect of ending this prosecution.*

CP 216 (emphasis added).

5. Appellant assigns error to the following findings contained in the Order Allowing State to Pursue Intentional Second Degree Murder at Trial, in their entirety:

The court finds that granting the defendant's motion to dismiss this case would defeat the ends of justice. As such, the court finds the "interests of justice" exception to the mandatory joinder rule applies in this case and should be invoked to deny the defendant's motion.

CP 216.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 4.3.1 requires that the prosecution charge all offenses which are related, and that any later filed charges of related offenses will be dismissed. In this case, appellant was charged with and convicted of second-degree felony murder with an assault predicate, in 1986-87. Later, pursuant to In re Andress, 147 Wn.2d 602, 616, 56 P.3d 981 (2002), and In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), the conviction was overturned.

Did the court err and was the mandatory joinder rule violated when the court permitted the prosecution to add a new charge of second-degree intentional murder which was for the same conduct and could have been charged initially?

2. The trial court based its decision to allow the prosecution to file a new charge in part on the belief that the filing of the original charge and the trial on that charge had somehow been "erased" by the

subsequent decision, in Andress, that the charge was legally invalid.

Did the court err in holding that Andress somehow erased the prior filing and proceeding where Andress did not so hold and the trial court's decision here was completely unsupported by any other law?

3. Further, did the court err in holding that the "ends of justice" exception permitted the filing of the new charge where the court failed to consider the significant time Mr. Ford had already served for the crime and focused only on the prosecution's ability to further pursue charges?

4. Did the "ends of justice" exception to mandatory joinder apply to permit the prosecution to file a new charge against a defendant 19 years after the trial on the original charge where the prosecution was aware that the original charge was subject to challenge and chose not to charge in the alternative, and where the defendant has already served more than the presumptive standard range for the offense?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Leron Ford was charged by amended information filed in Pierce County on September 22, 1986, with second-degree felony murder with assault as the predicate felony, and second-degree assault. CP 42-43; former RCW 9A.32.050(1)(b) (1975); former RCW 9A.36.020(1)(b) (1986). Mr. Ford was convicted as charged, ordered to

serve a 600 month exceptional sentence, and appealed, unsuccessfully. CP 44-45, 77-82, 90, 98-116, 119-20.

On April 26, 2005, this Court granted Mr. Ford's personal restraint petition and vacated the second-degree murder conviction based upon Andress and Hinton. CP 117-18.

After further proceedings, described in more detail *infra*, Mr. Ford was charged by Fourth Amended Information with intentional second-degree murder and second-degree assault. CP 244-45.¹ The same day, a document was entered indicating that the parties had agreed to a stipulated facts trial. CP 229-43. The court found Mr. Ford guilty both of intentional second-degree murder and of first-degree manslaughter as a lesser included offense, and ordered a sentence based upon those findings. CP 246-69. Findings and conclusions consistent with the court's findings were later entered. CP 257-66.

Mr. Ford appealed, and this pleading follows. See CP 256.

2. Facts relating to offenses

The murder charge was based upon the death of T.F., Mr. Ford's two-year old daughter, in 1986, who died as a result of injuries apparently caused by beating. CP 1-4. The assault was based upon injuries caused by

¹The verbatim report of proceedings in this case consists of 12 volumes. The volume containing the proceedings of July 12, 2005, will be referred to as "1RP." The 11 volumes containing the proceedings of July 26, August 10, August 17, August 22, September 22, and October 6, 2005, and January 3, 4, 10, 11, and 12, 2006, will be referred to as "RP."

beating to S.F., who was three at the time. CP 1-4.

3. Overview of relevant facts²

Initially, Mr. Ford was charged with and convicted of second-degree felony murder with assault as the predicate felony, and second-degree assault. CP 42-43; former RCW 9A.32.050(1)(b) (1975); former RCW 9A.36.020(1)(b) (1986). He was not charged with any other means of committing the homicide crime. CP 42-43. After this Court granted Mr. Ford's personal restraint petition and vacated the second-degree murder conviction based upon Andress and Hinton on remand, on July 12, 2005, the Honorable Sergio Armijo entered an order vacating the conviction. CP 126-27; 1RP 2-3.

Mr. Ford then objected to the prosecution's filing of a second amended information, in which the prosecution had added a charge of intentional second-degree murder and recharged the assault. 1RP 2-3. He noted he had already served all of his time on any standard-range sentence for second-degree murder, and asked to be released from custody. RP 3. The prosecutor asked the court to "arraign" Mr. Ford now and permit further briefing on the issue, and the court did so. 1RP 3, 5-6.

The parties next appeared on July 26, 2005, before Judge Vicki Hogan, where the prosecution admitted that Mr. Ford had already served

²More detailed discussion of certain relevant facts is contained in the arguments section, *infra*.

about 19 years in custody, “more than the standard range sentence would allow for a murder in the second degree conviction.” RP 4. The prosecutor mentioned that the parties were going to brief and argue the issue of the defense “motion to preclude” the prosecution from proceeding on “intentional murder,” then informed the Court that he intended to file another Amended Information to add aggravating factors in order to seek an exceptional sentence. RP 6, 11.

On August 17, 2006, the parties again discussed the issue before Judge Hogan. RP 35. Mr. Ford argued that it was improper for the prosecution to add the charge of second-degree intentional murder not originally charged, and noted that the facts of the offense were such that neither first nor second-degree manslaughter were lesser included offenses. RP 35-39; CP 124-25. As a result, he argued, the only permissible option was for the court to enter a verdict for second-degree assault or attempted second-degree assault, based upon the fact that such assaults would have to have been found by the jury in order to convict of the felony murder. RP 35; CP 121-25.

The judge denied the motion to enter a verdict on either assault, and granted another continuance regarding the filing of the new charge of intentional murder. RP 40; CP 221-22.

The next hearing on the issue was held before Judge Hogan on August 22, 2005. RP 56. Again, Mr. Ford argued that the prosecution

was precluded from adding a new charge of intentional murder under the mandatory joinder rule. RP 58-60. Again, he noted that the new charge was not a “lesser included” offense and that he had already faced jeopardy on the felony murder charge which was ultimately dismissed. RP 58-60. He also again argued that manslaughter was not a lesser included offense under the facts of the case, and that the only remaining charge available to the prosecution was the charge of second-degree completed or attempted assault. RP 60.

In response, the prosecution argued that the court should apply an “interest of justice exception,” basing his argument on the language of the Andress dissent and stating that the Andress decision and its application to the case was “from the sky,” not in the prosecution’s control, and “not anticipated.” RP 61. He disparaged the decision in Andress and its progeny as giving “every criminal convicted of felony murder two predicated on assault . . . a get out of jail free card.” RP 62. He stated that the prosecution could have charged intentional second-degree murder in the case and should not be precluded from doing so now. RP 63.

Mr. Ford questioned whether Andress was actually “shocking,” noting that every other state in the union had addressed the issue and held that assault could not be a predicate for felony murder. RP 63. He also pointed out that Supreme Court had previously addressed mandatory joinder in a case where there had been a scalding death of a two year old

and the Supreme Court had not applied any exception to mandatory joinder upon the dismissal of the murder count in that case. RP 63. He also pointed out that he had already served 19 years in custody, more than a standard range sentence for second degree murder, and the interests of justice indicated he had served his sentence and “paid the price for his act,” so that he should be released. RP 64.

The court then denied “the defense motion to preclude” the prosecution from charging intentional second-degree murder, finding that application of Andress to this case meant that “the trial with which Mr. Ford had in 1987, in essence, no longer exists.” RP 66. The judge also held that precluding the state from filing the new charge would “forever preclude the State of trying any defendant when newly created law comes into existence,” and found that application of the mandatory joinder rule would “defeat the interest of justice” because the Andress decision “abandons an unbroken line of precedent,” and Andress was “certainly extraneous to the prosecution of Mr. Ford.” RP 66. The court conceded that “[i]t’s undisputed that the State had the option to charge intentional murder in 1986,” but that the prosecution had not “negligently” failed to file an intentional murder charge because it had charged based upon the “long-standing interpretation of our State’s criminal statutes” and the vacation of that conviction was “outside the State’s control.” RP 67. Finally, the court found the prosecution’s claim that there would be “no

charge available to the State” if it could not charge intentional murder because there were no “lesser included offenses that exist in this case with Mr. Ford.” RP 67.

When the parties next met to enter the orders and engage in further pretrial proceedings, counsel objected to the portion of the proposed written order which indicated there were no lesser included offenses that the prosecution could pursue if the Court did not grant the prosecution’s motion, because the prosecution could have pursued second-degree assault or attempted second-degree assault. RP 75-78. Without explanation, the court refused to change the language and entered the findings. RP 77-78; CP 215-17.

The prosecution then filed a Third Amended Information, alleging several aggravating circumstances for the murder and stating an intent to seek an exceptional sentence, despite defense objection. CP 223-24; RP 36, 138, 139-40, 143.

After some preliminary proceedings for jury selection, the parties informed the court that they were planning to enter an agreement to proceed on stipulated facts while preserving the issue of whether the prosecution could properly amend the information to add the intentional second-degree murder count on remand. RP 166-72. The prosecution notified the court that Mr. Ford would enter a “stipulation” to finding guilt on first-degree manslaughter as a lesser included offense so that if the

appeal on the charging of the second-degree intentional murder was successful, the manslaughter conviction would remain. RP 173.

On January 11, 2006, the court was presented with a Document that indicated it was an agreement to proceed on stipulated facts. RP 180-206. Counsel indicated he had spent “in excess of an hour” going over the agreement with the defendant and the prosecutor and that Mr. Ford “has clearly represented to me that this is what he wants to do.” RP 187. The court inquired if Mr. Ford had any questions, then found that he had knowingly, voluntarily and intelligently given up his trial rights and rights to a bench trial, and to proceed on stipulated facts. RP 188-89. The court then asked Mr. Ford if he understood that he was making a “joint request” for a finding of guilt to first-degree manslaughter as a lesser included offense of second-degree intentional murder, and Mr. Ford said, “[y]es, ma’am.” RP 190-91. The court also asked if Mr. Ford understood that if he won his appeal he would not be remanded for trial but just sentencing on the manslaughter conviction, and he indicated, “[y]es, ma’am.” RP 191.

Judge Hogan then found Mr. Ford guilty of intentional second-degree murder and of manslaughter in the second degree as a lesser included crime of the intentional murder. RP 200-202. The following day, the Fourth Amended Information was filed, removing the aggravating circumstances. RP 199-201, 210-11; CP 244-45. Mr. Ford was sentenced

the following day to a high end standard range sentence of 192 months, with credit for the more than 230 months in custody he had already served. RP 216, 224-30; CP 246-55.

D. ARGUMENT

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO AMEND THE INFORMATION TO ADD THE CHARGE OF INTENTIONAL SECOND DEGREE MURDER NEARLY 20 YEARS AFTER THE FIRST TRIAL

In 1986, Mr. Ford was charged with second-degree felony murder with a predicate offense of assault, for the death of two-year old T.F. CP 42-43. In 2006, he was charged with intentional second-degree murder, for the very same acts. CP 126-27, 223-24, 244-45. This Court should reverse, because the amendment of the information to add the charge of intentional second-degree murder was in violation of the mandatory joinder rule and the trial court erred in finding that the “ends of justice” exception to the mandatory joinder rule applied.

First, the addition of the new charge violated the mandatory joinder rule, CrR 4.3.1(3). That rule provides, in relevant part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of those offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

Charges are “related” for the purposes of the rule when they are based on the same conduct, and “within the jurisdiction and venue of the same court.”

State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995).

Here, there can be no question that the 1986 charge of second-degree felony murder and the 2006 charge of second-degree intentional murder were “related;” they were for the same death, in the same court. Thus, the mandatory joinder rule applied.

The trial court erred in permitting the prosecution to file the additional charge in violation of the mandatory joinder rule. The purpose of the mandatory joinder rule is to protect defendants against “successive prosecutions based upon essentially the same conduct.” State v. Russell, 101 Wn.2d 349, 353 n.1, 678 P.2d 332 (1984), quoting, ABA Standards Relating to Joinder and Severance 19 (Approved Draft, 1968). Further, it is irrelevant whether the motive for the successive prosecutions is improper, such as to “harass” the defendant, or whether the prosecution is trying to place a “hold” upon someone after they have been sentenced to imprisonment. Id. The rule is intended as a limit on the prosecution, regardless of motivation. Dallas, 126 Wn.2d at 332-33.

Thus, in State v. Anderson, 94 Wn.2d 176, 616 P.2d 612 (1980) (Anderson I), the Supreme Court examined the statutory language and legislative history of former RCW 9A.32.030(1)(b), the portion of the first-

degree murder statute which involved acting with “extreme indifference to human life,” and concluded it did not apply where the harm involved was specifically target to the victim rather than the public at large. Then, on remand, the prosecution amended the information to strike the improper charge and add a new charge of intentional first-degree murder. State v. Anderson, 96 Wn.2d 739, 740, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982) (Anderson II). On appeal, the Supreme Court reversed for violation of the mandatory joinder rule, holding that the fact that the initial charge was improper as a matter of law did not mean that the prosecution was free to charge a new crime, rather than a lesser included offense. 96 Wn.2d at 740, 744.

Similarly, in this case, Andress examined the language and history of former RCW 9A.32.050(1)(b) (1975) and held that assault did not apply as a predicate felony for the purposes of convictions under that statute. As in Anderson II, the prosecution then amended the information to strike the improper charge and add a new charge of intentional second-degree murder. CP 244-45. And as in Anderson II, the new charge was not a lesser included offense but instead a new, previously uncharged means of committing a crime. See State v. Berlin, 133 Wn.2d 541, 553, 947 P.2d 700 (1997) (second degree intentional murder and second degree felony murder are “alternative means of committing the crime of second degree murder”).

Rather than following Anderson II, the trial court’s comments, and

findings, indicate that it was operating under the belief that the dismissal of the conviction based on Andress somehow “erased” the prior trial proceedings, so that joinder was not an issue. RP 67 (the trial in 1987 “no longer exists”); CP 216 (the charge of intentional second-degree murder is not an “alternative charge” because the original charge “has been held to be a charge that never existed”).

In Andress, however, the Court simply examined former RCW 9A.32.050(1)(b) (1975), and held that the statute did not provide for conviction of second-degree felony murder with assault as the predicate felony. 147 Wn.2d at 616. Nothing in Andress purported to erase all of the proceedings in which the prosecution had charged that crime. And nothing in that decision held that those filings, and the trials which followed, somehow did not any longer exist.

Further, if the trial court’s novel theory were correct and the subsequent invalidation of a charge on legal grounds rendered the prior proceedings not simply voidable but void and nonexistent, there would never be an issue of mandatory joinder when a statute did not apply to a defendant’s case, and Anderson I and Anderson II would not have decided as they were.

Thus, the trial court’s belief that Andress somehow wiped the slate clean and eliminated the existence of the prior filing of the later-dismissed charge and the trial on that charge was very much mistaken.

The court was also mistaken when it held that the “ends of justice”

exception to mandatory joinder should apply. See CP 216. It is true that Division One has held, in State v. Ramos, 124 Wn. App. 334, 343, 101 P.3d 872 (2004), that the exception is “implicated” where a felony murder conviction is vacated under Andress. But the fact that such a vacation occurs does not in itself amount to a justification for allowing violation of the mandatory joinder rule. Instead, a court examining the exception must examine the circumstances of the particular case in order to determine if the exception should apply. 124 Wn. App. at 343.

Here, the court was apparently swayed by the prosecution’s argument that, if it could not prosecute Mr. Ford for second-degree intentional murder, it could not prosecute him at all. See CP 216; RP 67. But the prosecution could certainly have charged Mr. Ford with first-degree assault. See RCW 9A.36.011 (assault inflicting “great bodily harm”); see Andress, 147 Wn.2d at 613-14 (noting that a “lesser included” instruction on assault is only ordinarily not properly given in cases where the defendant was charged with felony murder with an assault predicate only because such instructions are given only if the evidence indicates that just the lesser was committed and death has obviously in such cases). Whether the prosecution *wanted* to proceed on a charge of assault is not the same question as whether the prosecution *could have* done so. Here, it clearly could have, and the court’s finding to the contrary was in error.

Further, the court’s conclusion about the “ends of justice” erroneously

focused only on whether the prosecution could pursue Mr. Ford for another offense. It is true that, in the past, the issue of the “ends of justice” exception has arisen in the context of questions of “a scenario where through no fault on its part the granting of a motion to dismiss under the [mandatory joinder] rule would preclude the State from retrying a defendant or severely hamper it in further” prosecution. State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989); see Dallas, 126 Wn.2d at 332. But in Carter and Dallas, the time between the original charging and amendment was at most a few years. See Carter, supra; Dallas, supra. Because those cases did not involve situations where significant time had passed between the first charging and the amendment, those courts obviously did not need to discuss the impact of that fact on whether the “ends of justice” would be served by allowing the prosecution to pursue the defendant further.

Here, in contrast, 19 years had passed. Mr. Ford had spent that time in custody, serving a sentence for the death of the child. He has therefore already been significantly punished for the crime. And as the prosecution itself conceded, the time Mr. Ford had already served prior to the new proceedings was more than the standard range sentence for any second-degree murder. RP 4.

Thus, at the time the court allowed the prosecution to add the new charge, Mr. Ford had already spent the amount of time in custody the Legislature deemed was *presumptively* appropriate, proportionate and just for

the crime. See State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997). And virtually every other defendant convicted of second-degree murder would have been out of custody, having already been duly punished as prescribed by the Legislature.

Further, while the court was concerned that Andress was outside the prosecution's control, the initial charging decision was not. The prosecution could obviously have charged Mr. Ford initially in the alternative. It is common practice to do so. And the prosecution was certainly well aware that the felony murder rule and, more specifically, the unique Washington law permitting a conviction for felony murder based upon an assault predicate, was subject to challenge. It has long been a minority practice, rejected by most other states. Ramos, 124 Wn. App. at 342. And it had already been challenged well before this case was filed. See State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Safford, 24 Wn. App. 783, 604 P.2d 980 (1979); State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254, reversed in part and on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980). Yet the prosecution chose not to charge Mr. Ford in the alternative, despite knowing that the charge it was filing was frequently subject to attack.

This is not a case where the defendant "walked free" without serving any time for the offense. This is a case where the defendant had served more

than the standard range for the offense, prior to the recharging. And this is a case where the court's determination on the "ends of justice" was flawed and incomplete. This Court should so hold.

The next issue is the question of remedy, which involves examination of the form of the "Document Pertaining to Stipulated Facts Trial" (Document) which amounted to the stipulated facts agreement.

That document, and its contents, are extremely troubling. Usually, a stipulated facts agreement is intended merely to provide that a defendant is stipulating that the witnesses would say what the prosecution says they would say, if they were called to court. State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). The scope of such an agreement is limited and such agreements reserve many rights which a defendant who enters a plea necessarily waives. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Thus, in a stipulated facts agreement, the prosecution is required to prove its case beyond a reasonable doubt and the defendant maintains the right to appeal, whereas a defendant entering a plea waives those rights. Id; see State v. Wiley, 26 Wn. App. 422, 613 P.2d 549, review denied, 94 Wn.2d 1014 (1980).

Here, the Document not only indicates that the court may decide guilt or innocence based upon stipulated facts, it *concedes guilt*. CP 230. The Document provides, in relevant part, that Mr. Ford was not only waiving his right to a jury trial and a bench trial and agreeing to proceed on stipulated facts

but also that he “understands that the stipulated facts set out in this document will establish beyond a reasonable doubt the defendant’s guilt” for the intentional murder charge. CP 230. The Document also contained a stipulation that the prosecution would present evidence of “intent to kill” at any trial and that “the defendant affirmatively states that this court should find beyond a reasonable doubt that he intended to kill T[.]” CP 243.

Thus, the agreement in this case was not, in fact, an agreement to proceed by way of a stipulated facts trial, but was more akin to entry of a plea of guilty. See Mierz, 127 Wn.2d at 469.

In addition, with the agreement, Mr. Ford agreed to be convicted of manslaughter as a “lesser included offense” of the second-degree intentional murder even if the intentional degree murder charge was *completely invalid*. CP 231. The agreement provided that the parties agreed to “jointly request” a finding of guilt on first-degree manslaughter as a lesser included offense of second-degree intentional murder, and that Mr. Ford understood and agreed

that the practical effect of this provision is that if his appeal on the second degree murder conviction is successful, he will not be remanded for trial, he will only be remanded for sentencing on the manslaughter conviction.

CP 231. As counsel himself repeatedly argued, however, neither first nor second-degree manslaughter is a lesser included offense of second-degree felony murder with an assault predicate. CP 125; RP 35-39. And the Supreme Court has so held. State v. Gamble, 154 Wn.2d 457, 463, 114 P.3d

646 (2005).

As a result, Mr. Ford could *only* be convicted of manslaughter as a lesser included offense of intentional second-degree murder. See State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) (a defendant may only be convicted of a properly charged offense, a lesser degree or a lesser included offense of a charged offense); Art. I, § 22; RCW 10.61.003; RCW 10.61.006. And if the prosecution could not properly charge Mr. Ford with intentional second degree murder 19 years after the original information was filed, Mr. Ford could not be found guilty of the manslaughter offense, either.

It seems patently obvious that an attorney allowing his client to sign such an improper agreement has committed ineffective assistance. Without the agreement, the remedy in this Court would be clear: dismissal of both the intentional second-degree murder and first-degree manslaughter convictions and remand for proceedings solely on lesser included offenses of the original charge.

But the Document went still further. It also stated that Mr. Ford was waiving his right to appeal whether the “State should not have been allowed to prosecute him for first degree manslaughter.” CP 242. Indeed, the Document provided, “[t]he defendant gives up his right to raise any and all other issues” on appeal, and “understands and agrees that it is the intent of this agreement that the defendant only be allowed to appeal the joinder/double jeopardy issue

as it relates to second degree murder (intentional murder.” CP 242. And, most disturbing, the Document purported to waive Mr. Ford’s right to *any* oversight of counsel’s performance in having his client sign the agreement, because it included a waiver of the right to appeal “whether he had effective assistance of counsel.” CP 242.

It is highly questionable whether Mr. Ford could be bound by an agreement to be convicted of a crime with which he could not ordinarily be convicted. See In re Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002). And the decision to waive the right to appeal “must be made knowingly by the person convicted and not result from the negligence of his or her attorney.” State v. Tomal, 133 Wn.2d 985, 990, 948 P.2d 833 (1997).

Further, while a defendant may certainly waive the right to appeal, it is extremely unlikely that a waiver in an agreement can “bar an appeal based on the Sixth Amendment right to effective counsel,” due to the fundamental nature of the right and the inherent conflict created when an attorney is advising his client to sign away his rights to have that attorney properly represent him. See Jones v. United States, 167 F.3d 1142 (7th Cir. 1998); United States v. Henderson, 72 F.3d 463, 465 (4th Cir. 1994) (“a defendant’s agreement to waive appellate review. . . is implicitly condition on the assumption that the proceedings” below were “conducted in accordance with constitutional limitations;” waiver must not be “tainted by ineffective assistance of counsel”); United States v. Cockerham, 237 F.3d 1179 (10th Cir.

2001), cert. denied, 534 U.S. 1085 (2002) (“[i]t is altogether inconceivable to hold such a waiver enforceable” when it would deprive the defendant of the “opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation”) (quotations omitted); see also United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994) (questioning whether a plea agreement can waive a claim of ineffective assistance); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979 (1993) (otherwise valid waiver may not foreclose claim of ineffective assistance in entering waiver)..

Despite all this, Mr. Ford is not arguing on appeal that counsel was ineffective in having his client sign this wholly improper agreement. Nor is he challenging anything other than the propriety of filing the new charge of second-degree intentional murder. The potential cost of such arguments is simply too high. The Document specifically provided that Mr. Ford was “bound to the conditions of this agreement in every respect,” and that if he took “any action that violates the terms of this agreement in any way,” the prosecution could choose the remedy. CP 243.

Thus, the only remedy Mr. Ford can ask for is to have this Court dismiss the intentional second-degree murder conviction. The risk of making any other request for relief is that the prosecution will then proceed against Mr. Ford and seek an exceptional sentence against him again, despite the 19 years he has served. For this reason, Mr. Ford is only asking this Court to


reverse the second-degree intentional murder conviction, based upon the violation of the mandatory joinder rule.

E CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15th day of September, 2006.

Respectfully submitted,




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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;
to Mr. Leron Ford, at his current address.

DATED this 15th day of September, 2006.


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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Plaintiff,

v.

LERON FORD,

Defendant.


NO. 34326-6

CERTIFICATE OF SERVICE

The undersigned certifies that on December 29, 2006 she delivered by U.S. mail to the attorney of record for the defendant and defendant c/o his attorney true and correct copies of the Brief of Respondent. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed at Tacoma, Washington, on the date below.

Dated this 2nd day of January, 2007.


HEATHER JOHNSON
Legal Assistant